1988

State of Utah v. Donald L. Bee : Brief of Respondent

Utah Court of Appeals

Steve Majors; Deputy Davis County Attorney; Attorney for Respondents.
D. Bruce Oliver; Diumenti & Lindsley; Attorney for Appellant.

DOCKET NO. 880469 IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	BRIEF OF RESPONDENT
vs.	:	
DONALD L. BEE	:	Case No. 880469-CA
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

Appeal from judgment of the Second Circuit Court, Layton Department, in and for Davis County, State of Utah, the Honorable K. Roger Bean, Presiding

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Steven V. Major
Deputy Davis County Attorney
P. O. Box 618
Farmington, Utah, 84025

Attorney for Respondent

D. Bruce Oliver
Diumenti & Lindsley
505 South Main Street
Bountiful, Utah 84010

Attorney for Appellant

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D. Bruce Oliver
Diumenti & Lindsley
505 South Main Street
Bountiful, Utah 84010

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page No.

No cases were cited

STATUTES

IN THE UTAH COURT OF APPEALS

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Brief of Respondent

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JURISDICTION AND NATURE OF PROCEEDINGS BELOW

1. Jurisdiction is conferred upon the Utah Court of Appeals to hear this appeal by Utah Code Ann. 78-2a-3(b) 1953, as amended.

STATEMENT OF ISSUES

I. Whether the trial judge properly admitted State's Exhibit "C", and whether it was proper to allow the jury to consider the results of an intoxilyzer test that was given.

II. Whether the trial judge properly instructed the jury on the time frame in which an intoxilyzer test must be given and whether that instruction contained an unconstitutional presumption.

STATEMENT OF THE CASE

This is an appeal from a conviction for driving under the influence of alcohol. The case was tried before a jury on the 6th day of May, 1988 and the defendant was found guilty. The defendant was sentenced on the 25th day of May, 1988 and on the 3rd day of June, 1988, a motion for new trial was filed by the defendant. This motion was denied and on the 29th day of July, 1988, a Notice of Appeal was filed.

STATEMENT OF FACTS

Respondent does not dispute the facts as set forth in Appellant's brief except that the State would put forth that no objection was raised as to Instruction No. 8.

SUMMARY OF ARGUMENT

1. That the State's Exhibits "B", "C", and "D" were properly accepted into evidence and submitted to the Jury. Each of these exhibits met the foundational requirements to be admitted and any interpretation of that evidence was a question for the Jury.

2. That Appellant failed to object to Instruction No. 8 at the trial level, and even if there had been an objection, the instruction does not set forth any unconstitutional presumptions that would warrant a reversal of the case.

ARGUMENT

POINT I

THE INTRODUCTION OF THE BREATH TEST GIVEN TO THE DEFENDANT WAS PROPERLY SUBMITTED TO THE JURY

As indicated in Appellant's brief, Appellant was charged by information with Driving While Under the Influence of Alcohol and/or Drugs. As part of the investigation, Appellant was given an intoxilyzer test to determine the alcohol content of his blood.

When an intoxilyzer test is used, Utah Code Annotated Section 41-6-44.3 sets out the standards which must be followed in order for the test to be introduced at trial. In the present case, the officer who gave the test to Appellant testified that (1) he had been trained and certified in the use of the intoxilyzer machine, (2) he followed each and every step in administering the test as he has been trained to do, (3) he inserted the intoxilyzer test record as required, and (4) it printed out the results on that test record (T.79 - 88)

The issue then became what the results printed on that test recorded meant. The State offered exhibit "D" which was the intoxilyzer test affidavit. There was no question that the machine used to give Appellant the test was the same machine that was the subject of the test affidavit.

A review of the affidavit shows that the machine used to test Appellant gives readings in grams of alcohol per 210 liters of breath. Therefore, when Appellant was tested, the machine used to test Appellant was measuring grams of alcohol per 210 liters in Appellant's breath. Therefore, the exhibits introduced by the State fully meet the requirements of Utah Code Annotated 41-6-44.3, and the Court did not error in allowing those exhibits into evidence.

It is a long held tradition that it is the trier of fact that determines the credibility or non-credibility of any witness or any evidence that is offered. Once the results of the intoxilyzer test was introduced to the Jury, it was their right and duty to determine what weight, if any, they would give that evidence.

If the information and jury instruction required the Jury find that Appellant had a blood alcohol content of greater than .08%, and the evidence produced by the State showed that the Appellant had a breath alcohol content rather than blood alcohol content, it was up to the Jury to decide whether the State has met it's burden or not . The Jury is free to accept or reject all or any part of the evidence submitted by the State.

Therefore, so long as the exhibits and evidence submitted by the State meets the foundational requirements as set out by statutes, they can be submitted to the jury. It is then the jury's duty to determine how those exhibits should be interpreted.

Finally, even if the Court were to find that the exhibits were improperly submitted, the State would point out that there was more than enough other reliable evidence on which the jury could have found the Appellant guilty.

POINT II

APPELLANT FAILED TO OBJECT TO THE INSTRUCTION AT THE TIME OF TRIAL AND THE INSTRUCTION DOES NOT SET OUT AN UNCONSTITUTIONAL PRESUMPTION.

In response to Appellant's second point on appeal, the State would point out that no objection was lodged to the instruction either at the time it was proposed or at the time it was read to the jury. Further, no motion for mistrial was made after the instruction was read.

Contrary to Appellant's statement that he was not given an opportunity to object to the instruction, the State would point out that during the course of the trial, Appellant moved the Court to dismiss two of the original counts. That motion was granted (T.167) and after granting that motion the Judge indicated that new instructions would be prepared (T.168).

New instructions were prepared and submitted to both the Defense and the Prosecution. The Judge read these instruction to the jury. Therefore, Appellant had at least two opportunities to object to the instruction: when new instructions were made, and when they were read to the Jury.

Even accepting arguendo that this issue is properly before the Court, the State would argue that the presumption set forth in the instruction does not rise to the level of violating Appellant's due process rights.

The instruction merely sets forth a presumption that if a chemical test was given within two hours of the driving, then the blood alcohol level shown by the test is presumed to be the same level as at the time of the actual driving. This instruction merely sets forth the natural fact that it takes a certain amount of time for alcohol levels in the blood to be metabolized out. Therefore, after a two hour period, very little alcohol will have been metabolized out of the suspects system and the test level will not be significantly affected.

Further, there is no presumption of correctness set forth in this instruction. The Jury must still decide whether the machine was operating correctly, whether the operator followed the proper steps in administering the test, and several other factors before they can conclude that the defendant is guilty.

If the instruction had stated in effect that had the test been given within two hours of the driving, then the jury is to presume that either the defendant is guilty or the test is accurate and they need not deliberate any further; that then would be an unconstitutional presumption.

Finally, even if this instruction is found to have been given improperly, it is harmless error in that there is more than sufficient evidence for the jury to have found the Appellant guilty.

CONCLUSION

The trial court did not error in allowing Exhibit "C" to be admitted into evidence, or to allow Instruction No. 8 to be given. Neither of these issues were major and there was more than sufficient evidence to convict the appellant of driving under the influence of alcohol.

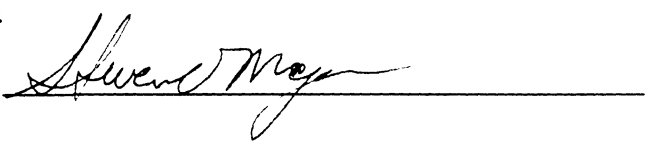
RESPECTFULLY SUBMITTED this 31 day of May 1989.

Steven V. Major
Attorney for Plaintiff/Respondent

CERTIFICATE OF SERVICE

This is to certify that on the 31 day of May, 1989, a true and correct copy of the foregoing Brief of was mailed with postage prepaid thereon, to the following:

D. Bruce Oliver
Diumenti & Lindsley
505 South Main Street
Bountiful, Utah 84010
Attorney for Defendant/Appellant



ADDENDUM

Utah Code Annotated Section 41-6-44.3:

(1) The commissioner of the Department of Public Safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath, including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was operating or in actual physical control of a vehicle while under the influence of alcohol or any drug or operating with a blood or breath alcohol content statutorily prohibited, documents offered as memoranda or records of acts, conditions, or events to prove that the analysis was made and the instrument used was accurate, according to standards established in Subsection (1), are admissible if:

   a. the judge finds that they were made in the regular course of the investigation at or about the time of the act, condition, or event; and

   b. the source of information from which made and the method and circumstances of their preparation indicate their trustworthiness.

(3) If the judge finds that the standards established under Subsection (1) and the conditions of Subsection (2) have been met, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.